

# **Additional Commercial Contract Types**

## **FAR Case 2003-027**

### **Summary of Comments from October 19, 2004 Public Meeting**

- Appropriate Use
- Terms and Conditions
- Payment

# Appropriate Use

- TYPES OF COMMERCIAL SERVICES SOLD TO THE GENERAL PUBLIC
  - IT software development often sold on a T&M/LH basis.
  - Be careful of using words such as “predominantly” to create a test as to whether a type of service can be procured under a T&M contract.
  - Instead of a list of specific services, consider identifying categories
    - By FSC
    - By NAICS
  - List of services may not be workable; many services sold on both FP and T&M/LH depending on particular circumstances/situation
  - Recommend that industry be allowed to offer on both fixed price and T&M basis and allow contracting officer to determine which is more advantageous to government based on offers received (NOTE: Rule should not require a D&F to issue a solicitation that invites an offer on both a T&M or FP basis; D&F to award T&M contract should be required only if the CO determines to award on T&M basis.)
  - Need further outreach to commercial sector that does not traditionally contract with the Government

# Appropriate Use

- CONDITIONS FOR USE
  - Any rule should provide the CO with guidance on the type of circumstances that would support a T&M contract
    - Installation services?
  - Analysis of risk to the parties
  - SARA refers to “contracts”
    - Does SARA apply to subcontracts?
      - Commercial sector does not compete at sub-level (SARA requires competitive award of T&M/LH contracts)
    - Keep the rule at the prime level (cf. FAR 31.205-26(e) and (f))
  - ANPR language on subcontracts is ok
  - Award should be based on rates and technical approach to performing the work, not just price.

# Appropriate Use

- ESTABLISHING SUITABILITY OF T&M AND LH CONTRACTS
  - D&F requires a description of market research conducted
    - need guidance on sources for market research
  - Refer CO to Part 7 for detailed instructions on how to perform market research. Market research requirement for this rule should focus only on establishing if T&M is a suitable contract type.
  - Since a T&M contract does not always specify an outcome, how does a contracting officer determine what is “in scope” for purposes of issuing a change order? Should issuance of modifications be discouraged?
  - Can a Fixed Price contract with prospective price redetermination serve the same purpose for many contracts that are awarded on a T&M basis?

# Appropriate Use

- ESTABLISHING SUITABILITY OF T&M AND LH CONTRACTS (CONT.)
  - Language in ANPR that the D&F must establish that the requirement has been structured to minimize use of T&M and LH contracts needs to be revised to reflect the intent of Congress that CO's establish that the requirement has been structured to MAXIMIZE THE USE OF FP CONTRACTS.
    - Delete references to limiting value or length of a T&M contract or order and indicate that the structuring of the requirement has to be on basis that is suitable for the acquisition.
  - Clarify when a D&F is required for and IDIQ contract that allows for issuance of both TM and FP orders
  - Is it redundant to require a D&F on each order issued under an IDIQ contract that provides for both FP and T&M contracts?
  - Is it necessary to require the D&F be approved at a level above the CO when an IDIQ contract will only provide for T&M/LH orders?

# Terms and Conditions

## Inspection/Acceptance

- Correction of Defects (Complexity Issues)
- Commercial Warranty (Applicability pursuant to Uniform Commercial Code)
  - Patent vs Latent Defects
- Definitive Outcome vs Level of Effort (Handling)

# Terms and Conditions

- Payments
  - 3 years after contract completion is not a commercial practice (access to records)
- Termination for the Government's Convenience
  - No Comments

# Terms and Conditions

- Subcontracts
  - How would a commercial contractor know about approved accounting systems?
  - Proprietary issues related to company's subcontracts
    - Commercial Company's handling of subcontract issues
    - Subcontract Terms and Conditions not generally found in commercial contracts

# Payments

- Substantiation of Vouchers –  
Direct Labor Hours
  - Timecard/Record Retention Times
  - Substantiation agreed to by  
Contracting Officer and Contractor at  
time of award
  - Blended rates vs actual cost

# Payments

- Materials
  - “Most Favored Customer” not a current commercial practice
  - Actual Cost = Amount Shown on Invoice
  - Paid cost rule does not apply

# Payments

- Subcontract Costs
  - Actual Costs
    - Similar to Firm Fixed Price lowest price competitively bid
    - Focus on qualifications of subcontractors
    - Cost Monitoring should be performed by prime contractor and CAO
    - Contract should specify technical requirements of labor

# Payments

- Access to Records
  - No Additional Comments
- Oversight
  - DCAA Involvement

# Payments

- Removal of Withhold Provisions
  - No Comments
- Total Cost
  - Material Handling & Subcontract Administration Costs
    - Suggestion: Fixed amount estimated in proposal
  - Other Direct Costs
    - Travel/ODC

# Payments

- Ceiling Price Increase
  - Determinations – how made?
  - Statute requires ceilings
- Overpayments/Underpayments
  - No Comments
- Release of Claims
  - No Comments

# Payments

- Prompt Payment
  - Interim & Final Invoices?
  - EFT Out Exceptions to Use
- Electronic Funds Transfer
  - No Additional Comments
- Discount
  - No Comments
- Cost Accounting Standards
  - Commercial companies will not comply with CAS